IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3115 OF 1986

Mrs.Mani Seervai of Bombay,
Indian Inhabitant, residing at
Flat No.1, 1st Floor, Chhotani
Building, Proctor Road, Grant Road,
Bombay 400 007. .. Petitioner
(Org.Deft.No.1)

Vs.

1. Smt.Tulsibai Hiranand
Achhipalia,

2. Shri Rajkumar Hiranand
Achhipalia,
since deceased by his heir:
2(i) Smt.Tulsibai wd/o Hiranand
Dendaram, mother of the
deceased residing at
Flat No.1, Second Floor,
52 Proctor Road,
Bombay 400 007.

3. Smt.Lacha W. Devnanai,

4. Smt.Lachmibai Daneshwar Jagwani

5. Shri Doulatram Matharam Jagwani

6. Chandru Metharam Jagwani,

7. Shri Tuljaram Murijmal Devnani
C/o.Shri Wadhuman Devani,
Seva Bhavan, 10th Road,
Khar, Bombay. .. Respondents
(Nos.1 & 2 -Org.
Plaintiffs.
Nos.3 to 7 -Org.
Defts.2 to 6)

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Shri A.K.Abhyankar for the petitioner.

None for the respondents though served.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 14TH NOVEMBER, 2005.

ORAL JUDGMENT :

1. Heard the learned advocate for the petitioner. None present for the respondents, though served.

2. The petitioner challenges the order dated 28th February, 1986 passed in R.A.E.Suit No.1058/3267 of 1985 in relation to the jurisdiction of the Court to entertain the RAE Suit.

3. The facts, as revealed from the records, disclose that a suit came to be filed by the respondent Nos.1 and 2 for declaration, possession and compensation against the petitioner and other respondents. The suit was contested by the petitioner on various grounds inter alia contending the absence of jurisdiction to the Court of Small Causes on the ground that the dispute between a person claiming to be a joint tenant and a trespasser cannot be entertained and tried as the suit arising under the provisions of the Bombay Rents, Hotel Lodging House

Rates Control Act, 1947, hereinafter called as "the Bombay Rent Act", and therefore, the Small Causes Court had no jurisdiction to entertain and try the suit. In view of the interim relief asked for, a request was made that the issue of jurisdiction be tried and decided in terms of the provisions of Section 9A of the Code of Civil Procedure, 1908. Accordingly, a preliminary issue came to be framed as to whether the Court had jurisdiction to entertain and try the suit, and the Small Causes Court by the impugned order proceeded to dispose of the said issue in exercise of powers under Section 9A of the Code of Civil Procedure holding that the said Court has jurisdiction to entertain and try the suit. Hence, the present petition.

4. Though the impugned order is sought to be challenged on various grounds, it is not necessary to consider all those grounds and suffice to deal with only one ground viz. whether the issue regarding failure on the part of the trial Court to give fair opportunity to the parties to lead evidence before the issue of jurisdiction is finally decided in exercise of powers under Section 9A of the Code of Civil Procedure ?

5. The learned advocate appearing for the petitioner referring to the impugned judgment submitted that the trial Court on one hand has held that, prima facie, the pleadings in the plaint disclose that the respondents/plaintiffs are claiming rights in respect of the suit premises and therefore the claim and the questions arised under the purview of Section 28 of the Bombay Rent Act, and on the other hand, the issue of jurisdiction has been finally decided without giving any opportunity to the petitioner to lead evidence in support of her contention and without analysing the materials placed on record. In that regard, reliance is also placed in the decision of the Division Bench in **Meher Singh v. Deepak Sawhny & Anr.,** reported in 1998(3) Mh.L.J. 940. He has further submitted that once the issue of jurisdiction is to be decided finally, the parties should get fair opportunity of leading necessary evidence in support of their rival contentions in relation to the said issue, and further that the Court has to take into consideration all the materials relevant for the purpose of deciding such issue before arriving at any conclusive finding on the point of jurisdiction to entertain and try the suit. The Court below having not considered the same and having proceeded to decide the said issue without giving fair

opportunity to the petitioner to lead necessary evidence as well as without considering the materials already on record, and merely on the basis of the pleadings in the plaint, has clearly acted contrary to the provisions of law rendering its judgment bad-in-law.

6. Section 9A of the Code of Civil Procedure provides that if at the hearing of any application for grant of any interim relief in a suit, an objection to the jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, then the said issue can be decided as a preliminary issue. The provisions of law contained therein specifically provide that "the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue." While dealing with the scope of Section 9A, the Division Bench of this Court in **Meher Singh's case (supra)** had clearly ruled that "Section 9A is a departure from the procedure established for deciding the preliminary issue as prescribed under Order XIV, Rule 2 of Civil Procedure Code. On many occasions, it is not always proper to pass an order of hearing the preliminary issue with regard to maintainability of a suit at the time of final hearing of the suit. If such issue is

decided at an earlier stage, rights of the parties can be crystalised. As stated earlier, section 9A is a departure from the procedure prescribed under Order XIV, Rule 2 of the Code of Civil Procedure for achieving that object. For determination of the preliminary issue, which may be mixed question of law and facts, the parties are required to lead evidence. Without permitting the parties to lead evidence the issue of jurisdiction cannot be finally determined. If it was to be decided only for prima facie purpose for granting interim relief, then there was no necessity of adding section 9A in the Civil Procedure Code. Secondly, on the basis of prima facie determination without proper adjudication, in our view, suit cannot be disposed of. The Plaintiff cannot be non-suited on the basis of the averments made in the plaint or in the Written Statement. If the issue is a pure question of law, then it may be decided without recording evidence, but if it is a mixed question of law and fact, then parties should be permitted to lead evidence on the facts of the case. Question of jurisdiction, even if it is a mixed question of law and fact, it is required to be decided first. For deciding the said issue, the parties are entitled to lead evidence, oral as well as documentary, as that issue is required to be tried and

adjudicated finally by the Court." It was also further held that "Raising and determination of the issue would certainly require adjudication as per the procedure prescribed in the Civil Procedure Code that is, after giving opportunity of leading evidence to both parties. ..... But if the issue of jurisdiction is required to be raised and finally determined, then it would require giving an opportunity of leading of evidence and hearing to both the parties."

7. Undoubtedly, the decision of the Division Bench in **Meher Singh's case (supra)** has been delivered much later in time as compared to the impugned order which was passed in 1986. However, it cannot be disputed that as the provisions of law stood even at the time of the impugned order was passed, Section 9A did not permit disposal of issue of jurisdiction merely on the basis of pleadings in the plaint and without giving an opportunity to the parties to lead evidence in support of their rival contentions on the said issue and more particularly when the issue was not a mere question of law but a question of fact. In the case in hand, there are disputed questions of fact which are required to be gone into before arriving at the conclusive finding on the point of jurisdiction of

the Court to entertain and try the suit. Being so, it was obvious that the trial Court should have given fair opportunity to the parties to lead evidence in support of their rival contentions on the said issue, and based on all the materials which are placed before the Court, on analysis thereof a final decision on the point of jurisdiction to entertain and try the suit could have been arrived at. Merely because the plaint at one place discloses the averments regarding claim of tenancy rights and certain questions arise in terms of the provisions of Section 28 of the Bombay Rent Act, the point which was sought to be raised by the petitioner ought to have been considered based on the materials on record and more particularly when the contention of the petitioner was that the suit is on allegation that the petitioner to be a trespasser, it was necessary for the Small Causes Court to consider whether it could have entertained such suit or whether such suit would lie before the City Civil Court. Undisputedly, the impugned order nowhere discloses any such discussion in that regard and, as rightly submitted by the learned advocate for the petitioner that merely by referring to the pleadings in the plaint it has been held that prima facie the same discloses the claim of tenancy rights and therefore the questions arised under the purview of Section 28

of the Bombay Rent Act. Section 9A of the Code of Civil Procedure does not permit disposal of an issue of jurisdiction in such a slipshod manner. Section 9A cannot be construed to allow the Courts to ignore the basic principles of natural justice. Disposal of issue of jurisdiction merely on the basis of the pleadings in the plaint would result not only in violation of the provision regarding right of the parties to be heard in accordance with the procedure prescribed under the Code of Civil Procedure but would also virtually result in the denial of basic principles of natural justice. Being so, the impugned order which has been passed ignoring the statutory provisions of law and without affording the opportunity to the petitioner and other parties to lead evidence in support of their rival contentions on the issue of jurisdiction to the Court, cannot be sustained and is liable to be quashed and set aside and the matter will have to be remanded to the Small Causes Court, Mumbai, to deal with the said issue after giving a fair opportunity to the parties to lead evidence in support of their rival contentions on the said issue.

8. In the result, therefore, the petition succeeds. The impugned order is hereby quashed and

set aside and the matter is remanded to the Small Causes Court, Mumbai, to deal with the issue of jurisdiction after giving a fair opportunity to the parties to lead evidence in support of their rival contentions on the said issue. Considering the fact that the suit relates to the year of 1985, the Small Causes Court, Mumbai, shall expedite the hearing of the matter and shall dispose of the said issue as early as possible and in any case within a period of one year from the date of receipt of the writ of this Court. Rule is made absolute in above terms. No order as to costs.

(R.M.S.KHANDEPARKAR, J)